In the
Supreme Court of the United States

OCTOBER TERM, 19/9

NO. 79-312

CORENSWET, INC.,
Petitioner

versus

AMANA REFRIGERATION, INC.
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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In reply to Respondent's Brief in Opposition, Petitioner Corenswet, Inc. states as follows:

1. RESPONDENT'S CLAIM OF MOOTNESS.

Respondent claims that the issues raised in the petition for a writ of certiorari are moot because Respondent, over Petitioner's protests, terminated the distributorship *after* the Fifth Circuit's decision. The issues are *not* moot and Respondent's contention in this respect is palpably inaccurate and misleading.

Although the Fifth Circuit did vacate the District Court's injunction and Respondent did unilaterally terminate the distributorship, *Petitioner sued for damages* as well as for injunctive relief. [1] The pending and outstanding claims for damages alone prevent this case from being considered moot. See, e.g., *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), (in which this Court held in a suit for declaratory and injunc-

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1. In addition to a prayer for injunctive relief, the original complaint prayed:

> "[T]hat damages be awarded in favor of plaintiff Corenswet, Inc. and against Amana Refrigeration, Inc. in the sum of $1,000,000.00. . . ." 1538 App.6

Petitioner filed an amended complaint on August 9, 1977, and prayed in part for the following damages:

> "[T]hat damages be awarded in favor of plaintiff Corenswet, Inc. and against Amana Refrigeration, Inc. in the sum of $1,000,000.00 actual and consequential damages and the additional sum of $3,000,000.00 punitive damages. . . and, alternatively, if any of the injunctive relief prayed for herein is not granted, that additional damages be awarded in favor of plaintiff Corenswet, Inc. and against Amana Refrigeration, Inc. in the sum of $7,000,000.00 actual and consequential damages and $3,000,000.00 punitive damages . . . ." 3474 App. 105.

tive relief and damages by homeowners against a utility company for termination of utility service that even though the injunctive issues were no longer viable, "Respondents' claim for actual and punitive damages arising from MLG&W's terminations of service saves this cause from the bar of mootness." At p.8); and *Powell v. McCormack*, 395 U.S. 486 (1969), (in which this Court held that Adam Clayton Powell's claim for back salary saved his case from mootness even though he sued for declaratory and injunctive relief to be seated in the House of Representatives and was, in fact, seated in the 91st Congress).

Respondent's termination of the distributorship does not in any way affect the viability of Petitioner's claim for damages. In fact, Respondent's conduct only aggravates and increases Petitioner's damages. If this Court were to grant review and reverse the Fifth Circuit, Petitioner could still obtain very meaningful relief at least in the form of damages. To suggest, as Respondent has, that the issues presented here are moot is grossly misleading.

Respondent has only recently contrived its claim of mootness. Respondent filed an answer and counterclaim on July 23, 1979, *more than one month after* it unilaterally terminated the distributorship. The plea of mootness is ostensibly absent from that pleading, even though the operative facts upon which Respondent asserts that contention in this Court

were present when that pleading was filed. [2]

Moreover, the District Court does not consider that Respondent's conduct in unilaterally terminating the distributorship moo[illegible]d any of the issues presented herein. A preliminary pre-trial conference was held in the District Court on August 8, 1979, some seven weeks after Respondent terminated the distributorship. The District Court considered the issues to be viable and recognized that this Court could reverse the Fifth Circuit. Consequently, the District Court postponed any

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2. In that counterclaim Respondent prays that it be awarded damages of $15,000.00 upon the allegation that:

> "Defendant, as plaintiff in counterclaim, further shows that it has been damaged as a consequence of plaintiff's and defendant in counterclaim's refusal to recognize the termination of said contract [in 1976], by the entry of the preliminary injunction herein allowing said defendant in counterclaim to act as an Amana distributor and by the actions and conduct of defendant in counterclaim in continuing to act as a distributor of Amana products, which damages consist of or arise from loss of profits, failure to properly and adequately develop the market, both existing and potential, and loss of trade, business and goodwill, for all which plaintiff in counterclaim presently claims $15,000.00, the amount of the bond required by the Court herein, reserving, however, the right to increase the amount of this claim as the facts become known."

Respondent's pending counterclaim for damages only strengthens the viability of this suit and the issues presented to this Court.

further action pending decision by this Court. [3]

Respondent's erroneous and belated claim of mootness should not thwart review by this Court of the important issues raised herein which are of true nationwide concern and of extreme importance to hundreds of thousands of franchisees doing billions of dollars of business annually throughout the nation. The issues presented to this Court are by no means moot. They are vibrant, viable and vital issues to the resolution of this controversy. More importantly, the issues are vibrant, viable and vital to the uniform, national resolution of whether the Uniform Commercial Code's good faith provisions, which have been adopted in all 50 states, preclude a national franchisor from terminating a franchise of unlimited duration arbitrarily and in bad faith.

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3. The Minute Entry issued by the District Court after that conference states:

> "A preliminary pre-trial conference was held this date.
> PRESENT:
>
> ROBERT E. BARKLEY, JR., ESQ.
> CHARLES M. LANIER, ESQ.
>
> Counsel advised that writs are to be applied for in the U.S. Supreme Court and that until this appellate aspect is final no trial date should be assigned. Accordingly, a further preliminary conference will be held before United States Magistrate Marcel Livaudais, Jr. on *November 16, 1979 at 9:30 A.M.*"

2. UNRESOLVED CONSIDERATIONS RAISED ON CERTIORARI

Respondent has failed to address the basic questions set forth in the petition that justify the granting of certiorari. That justification is found in the fact that this Court has provided no definitive answers to the following questions.

1. What is a federal diversity court's obligation under *Erie* in interpreting and applying the universal "good faith" provisions of the Uniform Commercial Code, where those provisions have received no authoritative interpretation by the courts of the particular state whose Code is in issue?

2. Is a federal court obligated in that situation to interpret and apply the "good faith" provisions in accordance with its own interpretative standards, or must it interpret and apply such provisions so as to promote the national uniformity of "the law among the various jurisdictions" that the Uniform Commercial Code is designed to achieve?

With respect to that question, the decision of this Court in *Commercial National Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520 (1916), may cast some relevant light. The Court there held that a federal bankruptcy court should apply in nationally uniform fashion certain provisions of the Uniform Warehouse Receipts Act, as then in effect in Louisiana. The rationale of that case supports a similar approach when a federal diversity court is confronted with the "good faith" provisions of the Uniform Commercial Code, in effect in more that fifty jurisdictions in the United States.

3. Is a federal diversity court's *Erie* obligation, with respect to interpreting and applying a nationally uniform statute, such as to preclude it from reading into that statute an exception to, or a limitation on, the universal "good faith" provisions where such an exception or limitation has not expressly been created by the state whose code is in issue?

4. May a federal diversity court, in pursuit of such an *Erie* obligation, consider the "good faith" concepts that appear in other federal and state legislation dealing with the same substantive legal problem - - i.e., the arbitrary or bad faith termination of franchise agreements?

5. What is the effect on a federal diversity court's *Erie* obligation to interpret the "good faith" provisions of the Uniform Commercial Code of the fact that those provisions have been made relevant to a nationwide franchise termination problem? [4] If the Uniform Commercial Code is

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4. Respondent's attempt to take exception to identifying the arbitrary termination in this case to the identical problem which exists in the "national franchising phenomenon" is totally fanciful. The Fifth Circuit repeatedly equated distributorship agreements and franchise agreements. The Fifth Circuit spoke of "franchise and distributorship relationships," "distributorship or franchise agreements," "distributorship agreements, like franchise agreements," "special problems faced by distributors and franchisees," "reasonable expectations of distributors and franchisees," and "what are essentially franchise agreements." (Petition for Writ of Certiorari, Appendix pp. A-7, A-20, A-14, A-18, A-18 and A-21 respectively). The arbitrary termination

to become a part of a national arsenal designed to battle a national franchise termination scandal, should not the federal court take pains to interpret the Code provisions in a manner consistent with this national policy?

Suffice it to say that the Respondent offers in objection no reason why these important questions should remain unanswered. If it be true, as Respondent argues, that there are none of the traditional types of conflict here present, the appropriateness of granting certiorari becomes here more apparent. An influential federal court has resolved a contract issue that has national significance, and it has done so in the context of interpreting and applying a truly national code of good faith requirements. The novelty and the importance of this ruling cannot be overemphasized.

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4. (continued)
of Petitioner is identical to and part of the national problem of arbitrary termination which threatens all franchisees and distributors.

The Respondent attempts to characterize this case as "nothing more than a private dispute between two large corporate entities." (Brief in Opposition, p. 10). Apart from the fact that Respondent is approximately 30 times larger than Petitioner, Respondent clearly possesses the "dominant economic power" and benefits from the "disparity in bargaining power" which permits Respondent to wield that same economic power possessed by national franchisors. (See Petition at p. 13).

For these reasons supplementing those in the petition, certiorari should be granted.

Respectfully submitted,

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